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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

P. S. GUSS D/B/A PHOTO SOUND PRODUCTS MANUFACTURING COMPANY, *Appellant*

v.

UTAH LABOR RELATIONS BOARD

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR THE UNITED STEELWORKERS OF AMERICA

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TABLE OF CONTENTS

	Page
INTRODUCTORY STATEMENT	1
SUMMARY OF ARGUMENT	5
ARGUMENT	
I. THE THESIS THAT THE BOARD'S JURISDICTIONAL STANDARDS EXCLUDE A PRECISELY DEFINED SEGMENT OF BUSINESS ENTERPRISE FROM THE SUBSTANTIVE APPLICABILITY OF THE ACT CANNOT BEMAINTAINED	8
A. The Relationship of the Board's Standards to the Substantive Provisions of the Act	9
B. Changes in Standards and in the Amount of Business	15
C. The Nature of the Board's Standards	18
1. Retail Stores	19
2. Multi-state non-retail enterprises	20
3. Secondary Boycott Cases	20
4. Employer Associations	21
5. Public Utility and Transit Companies	22
6. Restaurants and Cafeterias	24
7. Inter-related and Subsidiary Companies	24
8. Conclusion	25
II. TO INSURE CONSISTENCY WITH THE FEDERAL ACT IN CASES WHICH THE FEDERAL BOARD REFUSES TO HANDLE IT IS NOT ENOUGH TO LIMIT STATE ACTION TO THE PROHIBITION OF CONDUCT UNPROTECTED OR FORBIDDEN BY THE FEDERAL ACT	28
III. SECTION 10(a) OF THE ACT PRECLUDES THIS COURT FROM PERMITTING THE STATES TO ACT EVEN IN CASES SUCH AS THIS ONE WHERE THERE IS NO INCONSISTENCY WITH THE OTHER PROVISIONS OF THE FEDERAL ACT	35
APPENDIX A—Decision of the National Labor Relations Board in *Star Garter Co.*, 114 NLRB 957 (1955)	43
APPENDIX B—Excerpt from the Nineteenth Annual Report of the National Labor Relations Board (1955)	46

AUTHORITIES CITED

Page

Cases:

American Tool Works, 116 NLRB No. 247, 39 LRRM 1072 (1956) 29

Aroostook Federation of Farmers, 114 NLRB 538, 36 LRRM 1611 (1955) 17

Auto Workers v. *Wisconsin Board,* 351 U.S. 266 (1956) 41

Bearing & Rim Supply Co., 107 NLRB 101 (1953) 22

Bickford's Inc., 110 NLRB 1904, 35 LRRM 1341 (1954) 24, 26

Breeding Transfer Co., 110 NLRB 493 (1954) 18, 38, 39

Carpenters Union (Ellinwood Corp.) 115 NLRB 43, 37 LRRM 1229 (1956) 22

Central Electric Cooperative, 113 NLRB 1059 26

City Window Cleaning Company, 114 NLRB 906, 37 LRRM 1062 (1955) 24

Coca Cola Bottling Co. of New York, 114 NLRB 1423, 37 LRRM 1176 26

Coca Cola Bottling Company of Stockton, 110 NLRB 840 (1954) 15

Clay Electric Cooperative, Inc., 111 NLRB 175 26

C. R. Brown Cafeterias, 115 NLRB 1772, 38 LRRM 1166 (1956) 24

Deskins Super Market, 115 NLRB 1571, 38 LRRM 1121 19

Dixie Coca Cola Bottling Co., 116 NLRB No. 38, 38 LRRM 1244 (1956) 20

East Newark Realty Corp., 115 NLRB 483, 37 LRRM 1328 (1956) 13, 23

F. M. Reeves and Sons, 111 NLRB 186 (1955) .....

Gary Hobart Water Corp., 115 NLRB 1575, 38 LRRM 1123 (1956) 23

Godchaux Sugars Inc. v. *Chaisson,* 78 S.W. 2d 673, 35 LRRM 2515 (1955) 14

Greenberg Mercantile Corp., 112 NLRB 710 (1955) 20

Greenwich Gas, 110 NLRB 564 (1954) 22

Insulation Contractors, 110 NLRB 638 (1954) 22

Jonesboro Grain Drying Cooperative, 110 NLRB 481 ..... 22, 23

Local 1976 (Sand Door and Plywood Co.), 113 NLRB 1210 (1955) 26

Mid-West Car Pool Assn., 114 NLRB 721, 37 LRRM 1023 (1955) 13

Mine Workers v. Arkansas Flooring Co., 351 U.S. 72 (1956) 6, 11

Missco, Inc., 116 NLRB No. 163, 38 LRRM 1441 (1956) 20
Moving Picture Machine Operators, 115 NLRB 952, 37 LRRM 1450 (1956) 25
NLRB v. *Bradford Dyeing Assn.*, 310 U.S. 318 (1940) 12
NLRB v. *Kartarik Inc.*, 227 F. 2d 190 (8th Cir. 1955) 16
NLRB v. *Stanislaus Implement Co.*, 226 F. 377 (9th Cir. 1955) .. 16
NLRB v. *Longview Furniture Co.*, 206 F. 2d 274 (4th Cir. 1953) 29
NuTone, Inc. 112 NLRB 1153 (1955) enforced as modified, *Steelworkers* v. *NLRB*, 39 LRRM 2103 (D.C. Cir. 1956) ..29, 30
Orkin Exterminating Co., 115 NLRB 622, 37 LRRM 1365 (1956) 25
Orkin "The Rat Man", Inc., 112 NLRB 762, 36 LRRM 1102 (1955) 25
Potash Mines Transportation Co., 116 NLRB No. 179, 38 LRRM 1460 23
Plankinton Packing v. *Wisconsin Board*, 338 U.S. 953 (1950) ... 4
Reilly Cartage Company, 110 NLRB 1742 (1954) 21
Republic Steel Corp. v. *NLRB*, 107 F. 2d 472 (3d Cir. 1939) ... 29
Reliable Mailing Service, 113 NLRB 1263 (1955) 26
Richland Laundry and Dry Cleaners, 112 NLRB 294 (1955) ... 16
Rollo Transit Corp., 110 NLRB 1623 (1954) 13
Star Garter Co., 114 NLRB 957, 37 LRRM 1071 .....27, 43
Tanner Motor Tours, Ltd., 112 NLRB 275 (1955) 26
Teamsters' and McAllister Transfer, Inc., 110 NLRB 1769 (1954) 21
Thomas Jefferson, Inc. v. *Hotel Employees*, 80 So. 2d 583, 37 LRRM 2338 (Fla. 1956) 34
Truck Driver Local Union v. *NLRB*, 281 F. 2d 110 (2d Cir. 1956) cert. granted No. 103, Oct. Term, 1956, 352 U.S. 818.. 22
Weber v. *Anheuser-Busch*, 348 U.S. 468 (1955) 5
Western Machine & Tool Co., 115 NLRB 978, 37 LRRM 1467 (1956) 17
Whippany Motor Co., 115 NLRB 52, 37 LRRM 1234 (1956) ..17, 26
Woodard v. Collier, 78 S.E. 2d 526 (Ga. Sup. Ct., 1953) 34

Statutes:

Ga. Code Ann. §§ 54-801—15-805 35
Tex. Rev. Civ. Stat. Ann., Art. 5154(g) (1955) Ch. 387. Laws of 1955, approved June 3, 1955 35
Va. Code Ann., §§ 40-64—40-67, §§ 56-509—56-528 35
Wis. Stat (1953) §§ 111.01-111.19, §§ 111.50-111.64 35

Page

Labor-Management Relations Act, 1947, 29 U.S.C. §§151 et seq.:

Sec. 2(3) 5, 14
Sec. 7 ..... 10, 29
Sec. 8 ..... 10, 29
Sec. 8(b)(4) 21
Sec. 8(b)(4)(B) 31
Sec. 9 12
Sec. 9(a) 11
Sec. 10 10
Sec. 10(a) 8, 36
Sec. 152(7) 9

Debates:

93 Cong. Rec. 1844 (1947) 32
93 Cong. Rec. 4198 32
93 Cong. Rec. 4578 12

Reports:

H. Rept. No. 245 on H.R. 3020, 80th Cong., 1st. Sess., p. 321 12
S. Rep. No. 105 on S. 1126, 80th Cong., 1st. Sess., p. 26 37
S. Rep. No. 99 on S. 249, 81st Cong., 1st. Sess., p. 43 (maj. views); Part 2, p. 8 (minority views) 37
S. Rep. No. 986, 80th Cong., 2d Sess., pp. 30-31 37
S. Rep. No. 1211, 83rd Cong., 2d. Sess., pp. 17-18 (majority views); Part 2, pp. 14-15 (minority views) 37

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APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR THE UNITED STEELWORKERS OF AMERICA, *AMICUS CURIAE* [1]

INTRODUCTORY STATEMENT

This case, along with *Amalgamated Meatcutters, etc.* v. *Fairlawn Meats,* No. 41, and *San Diego Building Trades Council* v. *Garmon,* No. 50, presents the question of whether the states may assume jurisdiction over labor relations matters clearly subject to the terms of the National Labor Relations Act because the National Labor

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[1] Filed pursuant to the order of the Court of December 17, 1956, denying the Union's motion to be added as a party.

Relations Board has decided not to exercise its statutory jurisdiction.

This question arises in the three cases in quite different contexts. In the *Fairlawn* and *Garmon* cases, the challenged state action is an injunction against picketing and other forms of economic pressure deemed by Ohio and California, for somewhat different reasons in each case, to violate the policy of the state. The present case is quite different. Unlike *Garmon* and *Fairlawn*, and indeed, unlike most cases in which this question has been presented, the challenged state action is an administrative order issued by a state labor relations board against an employer as a result of unfair labor practice findings substantially similar to those which the National Board would have made if it had taken jurisdiction over the case.

The facts in this case, indeed, are so different from those in the *Fairlawn* and *Garmon* cases that they perhaps deserve more emphasis than they have been given by the appellants. In this case the Steelworkers Union filed a petition with the National Labor Relations Board in December, 1953, asking that it be certified as the exclusive collective bargaining representative for the Company employees. An election was held and the Union was certified on May 4, 1954. Thereafter the Union attempted to arrange a meeting for the purpose of negotiation with the Company. It was unsuccessful and on May 17, 1954, it filed a charge with the National Board that the Company had refused to bargain collectively in good faith. Subsequent to the filing of the charge, meetings took place on June 1 and June 23, 1954, and an interim agreement for the handling of grievances was signed. Then, in July, the National Labor Relations Board issued its new jurisdictional standards and on July 21, the Acting Regional Director of the Twentieth Region issued a letter in which he found that further proceedings on the charge

which had been filed earlier by the Union were not warranted because the operations of the Company did not meet the Board's jurisdictional standards.

The impact of this refusal to proceed by the agents of the National Board was immediate. As found by the Trial Examiner of the Utah Board, "After the NLRB decision, the respondents had no further intention of meeting or attempting to negotiate a contract."

The Union then filed a charge with the Utah Labor Relations Board, claiming that the Company had discharged a number of employees for their union activity, that it had interfered with the rights of the employees to engage in collective bargaining and that it had refused to bargain with the Union. The Utah Board sustained the refusal to bargain claim, finding, as stated, that after the NLRB decision the Company had no further intention of meeting or attempting to negotiate a contract with the Union. It also sustained four of the charges with respect to the discharge of employees, two of which took place subsequent to the refusal by the national Board to exercise jurisdiction.

In this case, in short, after the national Board had exercised its jurisdiction by certifying the Steelworkers' Union it then, pursuant to its new standards, refused to proceed further. Immediately upon this refusal, the employer made it clear that, as far as he was concerned, he had no further obligations. But the state board moved in and enforced, through its own procedures and by virtue of its own labor relations statute, the same obligations which the national Board would have enforced had it taken jurisdiction. The question here is whether the state board had power to do so.

We think that this recital of the bare outline of the facts of the case should make it plain that in this case, if in any, the state's action should be sustained. Local counsel for the Steelworkers Union were of the opinion

that the state could act under the circumstances of the case and therefore pressed the claim of the Union before the Utah Labor Relations Board. In the Utah Supreme Court counsel for the Union, as well as counsel for the State Board, urged that the state had jurisdiction and that the Board's order should therefore be sustained. In this Court there are obviously strong reasons why the Steelworkers Union should continue to assert the propriety of the State's action. It is concerned not only with the maintenance of its right to represent the employees here involved, but also with the very practical problem of obtaining for the employees unlawfully discharged by the Company some measure of restitution for the loss that they have suffered because they believed in and worked for the Steelworkers Union.

As we have already indicated to the Court in our motion to be made a party appellee, we have, regretfully, come to the conclusion that there is no reasonable basis upon which we can urge that this Court should sustain the result reached below. We believe that we have an obligation to the Court to explain fully the reasoning which has led us to this conclusion. It will be the purpose of this brief to set forth that reasoning.

As a preliminary matter, however, we wish to make certain premises of our reasoning quite explicit. First, we assume throughout that it is conceded that the Utah Board could not have assumed jurisdiction over this case if the standards for processing cases under which the national Board operated prior to July of 1954 were still in effect. Clearly, prior to that time the Board would have assumed jurisdiction since the employer's entire business consisted of work done under a contract to supply some $85,000 worth of equipment to the United States Air Force and, under the earlier standards, there was no $100,000 minimum in such cases. Equally clearly, under the principles of *Plankinton Packing Co.* v. *Wisconsin*

Board, 338 U.S. 953 (1950) and *Weber* v. *Anheuser-Busch,* 348 U.S. 468 (1955), the state board would not then have had jurisdiction to proceed. We do not understand any party to contend to the contrary.

Second, we assume that the Board's new standards are valid and that the case cannot, therefore, be disposed of by holding that the national Board should have assumed jurisdiction. This we believe to be a questionable premise, particularly if it is extended to an assumption that the Board's refusal to process an election petition in a similar case would be beyond attack. For the reasons we summarize briefly below, at pp. 41-42, we think that the Board's standards are based upon the use of inadmissible criteria and have been adopted for an impermissible purpose. But, unfortunately, none of the parties to this case in this Court have raised this issue. And since the Court on December 17, 1956, denied our motion to be made a party, even though we were parties below, we will not press the point here. We will assume, instead, that since the point was not raised by the parties this Court will neither confirm nor reject the propriety of the Board's standards. And we will set forth the reasons why, even on that assumption, we are forced to the conclusion that the order of the Utah Board cannot be sustained.

SUMMARY OF ARGUMENT

One theory on which state action here can be sustained is that presented by the respondents in the *Garmon* and *Fairlawn* cases and by the 7 Attorneys General: the Board's "jurisdictional" standards should be read as limiting the Act's substantive coverage, just like the exemption of agricultural laborers and domestic servants in Section 2(3). On this theory, the states are free to proceed with respect to enterprises outside the Board's standards wholly without regard to the provisions of the Act.

That this theory cannot be sustained is most easily seen by examining the text of the Act and this Court's decision in *Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 72, (1956). Even the 7 states which here argue for state jurisdiction implicitly assume that the substantive rules of the federal Act apply even where the Board refuses to take jurisdiction.

This conclusion is further demonstrated when we examine the manner in which the Board and the courts have treated cases in which (1) the Board's standards change or (2) the amount of business done by the employer in question changes. In both cases it seems agreed that cases should be disposed of on the theory that, irrespective of the change, the Act always was and continues to be substantively applicable.

The Board's standards, furthermore, do not remove a "precisely defined segment" of enterprise "having intrinsically local characteristics" from the Board's jurisdiction, so that a state body could independently determine whether the Board would or would not take jurisdiction. This is most clearly seen by examining certain examples of the manner in which the Board applies its standards. Such examination shows that the standards do not remove *any* enterprise, as such, from the Board's jurisdiction. They remove certain proceedings. Jurisdiction may be taken over an enterprise in one kind of a proceeding and refused in another, without any change in the amount of business done. Furthermore, the employer over whom jurisdiction is refused in one case may be a far larger enterprise, having a much greater impact on interstate commerce, than the employer over whom the Board decides to act in another. Nor are the Board's standards either precisely defined or static. They are, rather, complex and changeable.

All of these considerations make it clear that the Board's standards cannot be equated to a limitation on

the Act's substantive applicability such as to enable the states either to inhibit conduct which the Act protects or to make their own determination of what proceedings the Board will process.

These objections to state action would be met in a case, such as this one, in which (a) the national Board has specifically refused to act and (b) the conduct prohibited by the state is conduct which the Board itself would prohibit if it had taken jurisdiction. Further analysis indicates, however, that it is not enough that the particular conduct proceeded against by the state is conduct which is also forbidden by the federal Act. For the prohibitions and protections of the federal Act are a complex whole, each part dependent upon the other. If it punishes union action which occurs because the state fails to provide protections for the right to organize or bargain collectively the state may, in fact, be enforcing policy which conflicts with the federal Act even though in the particular case the conduct prohibited by the state is also prohibited by the federal Act. The importance of this consideration is shown by the absence of any protection for these basic union rights in the statutes of the states here seeking to prohibit union conduct.

On the assumption, therefore, that the substantive principles of the federal Act must be regarded as applying to all employers and employees within the Act's own definition of its coverage, we conclude that three conditions are necessary to avoid federal-state conflict in the areas where the Board declines jurisdiction: (1) that the Board refuse to proceed in the particular case; (2) that the conduct proceeded against be conduct not protected by the federal Act; and (3) that the state also provide the counterbalancing protections which the federal Act provides. Where these three conditions are met—as they are in this case—there is no basis for possible conflict.

We would urge a decision along such lines were it not

for the provisions of Section 10(a) of the Act. But Section 10(a) sets out, in terms, almost the precise equivalent of the conditions we have reached by analysis of the other provisions of the Act, with the exception only that Section 10(a) requires a specific agreement with the state and also requires complete consistency between the federal and state statutes. In view of the terms and legislative history of Section 10(a), we do not think that responsible argument can be made that Congress intended to let the courts work out a judicial substitute to deal with the same problem. The precise conditions of Section 10(a) not having been met, we conclude that the state cannot proceed even in a case such as this one.

A decision to this effect would not be catastrophic. Examination of the Board's new standards and the history of their promulgation shows (1) that they were not established to meet a case burden which could not otherwise be handled and (2) that they were established with the intention of transferring jurisdiction to the states. If this Court should hold this effort to be ineffective to accomplish its intended purpose, it is likely that the Board will reassume jurisdiction over much of the "no-man's land." If the Board cannot go all the way, complete freedom from both state and federal regulation of economic practices in the "no-man's land" is far less dangerous to the national labor policy expressed in the Act than would be the imposition of state rules which contradict that policy.

ARGUMENT

I—THE THESIS THAT THE BOARD'S JURISDICTIONAL STANDARDS EXCLUDE A PRECISELY DEFINED SEGMENT OF BUSINESS ENTERPRISE FROM THE SUBSTANTIVE APPLICABILITY OF THE ACT CANNOT BE MAINTAINED.

The simplest proposition which would sustain the state action here is the simple thesis put forward, in this Court,

by the respondent in the *Fairlawn* case, by the states of Florida, Georgia, Texas, Vermont, Virginia and Wisconsin, and by the American Retail Federation, et al., as *amici curiae*. That thesis is that the National Labor Relations Act should be read as if it simply excluded from its coverage the class of cases over which the National Labor Relations Board refuses to act. "The definition of the extent of the application of the law becomes as much a part of its substance as if written into it, or as if incorporated through judicial determination." (Brief for Florida, et al (hereinafter cited as States' Br.) p. 27.)

There being no federal law with respect to those cases, it is argued, there is no possibility of conflict and no basis to argue that a state may not apply its own labor policy, whatever that policy may be. Furthermore, there is no need to find a specific declination by the Board to act in a particular case. The states, in applying their own labor policies and remedies, are free to make the initial determination that a particular case is exempt from Federal law just as if the Board's jurisdictional standards were written, in *haec verba,* into the definition of "affecting commerce" in the federal Act. 29 U.S.C. § 152(7).

But it seems to us plain that this broad proposition is not, and cannot, be correct. There are many reasons for that conclusion, most of which have been set out cogently in the brief for the petitioners in the *Fairlawn* case. The most important of these is that the proposition urged by the states confuses substance and procedure. It ascribes to an indefinite and transitory set of rules as to whether the Board will process cases the consequences of a limitation of substantive law.

A. *The Relationship of the Board's Standards to the Substantive Provisions of the Act*

The error is most plainly seen when the function of the Board's so-called jurisdictional standards is examined in relation to the whole structure of the Act.

When the Board refuses to take an unfair labor practice case, it exercises the discretion which it argues is given it by the provisions of Section 10 of the Act, which provides that "The Board is *empowered* as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce." In refusing to exercise this power the Board does not say, and cannot, say that there has been no unfair labor practice or that Section 8 is inapplicable. It simply says that it chooses not to exercise the discretionary power given it to initiate administrative action to enforce the provisions of Section 8 of the Act.

This is not a case in which a regulatory body is given authority to establish rules and regulations but chooses not to exercise that power. The Board is not empowered to create unfair labor practices by the issuance of administrative regulations. Congress has decided substantively what are and what are not unfair labor practices in industries "affecting commerce." The Board is empowered, on its own theory, only to exercise discretion as to whether to initiate enforcement proceedings to prevent the actions which Congress has decided are unfair labor practices.

Even if it could be argued, somehow, that the Congressional definition of unfair labor practices in Section 8 was limited to the cases in which the Board, under its Section 10 power, decided to initiate preventive or enforcement measures, there remains Section 7 of the Act. Section 7 provides, without reference to unfair labor practices or unfair labor practice proceedings before the Board, a broad basic principle applicable to the full extent of the coverage of the Act:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bar-

gaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ."

Nothing in the Act indicates that this broad grant of rights to employees is to be limited to the cases in which the Board decides to act under Section 10. Contrariwise, as this Court has so recently held:

> "The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions and all courts, state as well as federal, are bound by them." *Mine Workers* v. *Arkansas Flooring Co.*, 351 U. S. 72,74.

The contention of the seven states that the entire Act is simply inapplicable to enterprises concerning which the Board refuses to act is further confounded if we look at the provisions of Section 9(a). Section 9(a) provides, again without reference to the Board or its proceedings, that:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect:

Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."

The Board is given power by Section 9 to conduct elections and issue certifications, upon petition, where there is doubt as to who is the collective bargaining representative or what is the appropriate unit. But the right of a union to act as the collective bargaining representative of employees, granted by Section 9, has never been deemed to depend upon whether the Board has conducted an election or issued a certificate. It has always been assumed, and rightly so, that the right to collective bargaining, and the employer's correlative duty to recognize the union for that purpose, flows from the terms of the Act itself not from a Board certification. *N.L.R.B.* v. *Bradford Dyeing Ass'n,* 310 U.S. 318 (1940). In 1947 the House proposed to amend the Act so as to require a recalcitrant employer to bargain only with a certified union. H. Rept. No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 321. The Senate refused to make the change and in conference its views prevailed. See 93 Cong. Rec., 4578 (1947).

In sum, the Board's refusal to institute unfair labor practice proceedings under Section 10 or to conduct elections under Section 9 cannot possibly be equated to the failure of a regulatory body to issue rules. It is a refusal by the body charged with enforcement and prevention duties to enforce rules established by the statute itself.

There *is,* to be sure, a theory upon which the adoption of so-called jurisdictional standards by the Board could be said to make the federal statute totally inapplicable. That theory would posit that the Board's standards constitute, not a refusal to process cases within the Board's jurisdiction, but an administrative definition of the term "affecting commerce" which defines the limits of the statutory coverage.

No party has presented such a theory here. And for

good reason. First, the Board has explicitly stated that this is neither the purpose nor intention of its rules. *East Newark Realty Corp.*, 115 NLRB 483, 37 LRRM 1328 (1956). Second, if the standards purported to be a practical definition of "affecting commerce" they could not stand, since, as the Board has itself recognized, they exclude many enterprises which are the very channels and instrumentalities of interstate commerce, *Mid-West Car Pool Assn.*, 114 NLRB 721, 37 LRRM 1023 (1955); *Rollo Transit Corp.*, 110 NLRB 1623 (1954),[2] and others which are "essential" to interstate commerce. *East Newark Realty Corp., supra.*

Finally, the Board's standards do not, as the seven states say, simply remove a "precisely defined segment of intrastate enterprise" from the scope of the Act.[3] The Board's standards establish rules to decide whether the Board will entertain certain proceedings, not rules limiting the Act's substantive applicability. Whether a proceeding relating to a particular enterprise will be entertained may depend, as we shall show below, on the nature of the proceeding, the date on which the hearing is held, and the prior actions of the parties. Jurisdiction may be exercised with respect to the same enterprise in one kind of proceeding but refused in another. And if the Board does proceed in a particular case it proceeds on the assumption that the Act was always applicable

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[2] As Members Murdock and Peterson, dissenting, pointed out in that case: ". . under the majority's new jurisdictional plan, a factory which ships $50,000 *in value* of goods across a state line is sufficiently engaged in interstate commerce to warrant assertion of our jurisdiction. The trucking company, however, which actually transports these goods as well as perhaps hundreds of thousands of dollars in value of other goods across State lines is held not sufficiently engaged in commerce to warrant the assertion of our jurisdiction because it receives $99,000 in cartage fees for such services." 110 NLRB at 1629.

[3] States Br. p. 34.

and will remain applicable, even though the Board's jurisdictional standards were not met at the time the actions in question occurred or at the time the Board's order is enforced.

The correctness of the conclusion that the Board's refusal to initiate unfair labor practice or representation proceedings cannot have the effect of totally withdrawing the applicability of the Act is illustrated by the simplest hypothetical case. Suppose that a state adopted a statute making it unlawful to organize, to strike or to picket. Such a statute clearly would not be contrary to the National Labor Relations Act if it applied only to agricultural laborers or domestic servants who are specifically excluded by Section 2(3) from the coverage of the Act. Indeed Louisiana has by court action adopted such a rule with respect to sugar plantations during the harvesting season. *Godchaux Sugars Inc.* v. *Chaisson*, 78 S.W. 2d 673, 35 LRRM 2515 (1955). Whatever its other constitutional infirmities may be, that rule clearly does not conflict with the National Labor Relations Act since it is limited to agricultural labor.

Could such a rule similarly be applied to organizations of employees in enterprises "affecting commerce" over which the Board had refused to exercise jurisdiction? It seems plain to us that it could not. We need not even argue the proposition because it appears to be plain even to the seven states who argue here for unlimited state jurisdiction. For they say, on pp. 26-27 of their brief:

> "It is not to be presumed that any state would act in such a manner, if permitted to regulate, as to deprive citizens of federally guaranteed rights. If there should be an overstepping it *could be tested in the same manner as in previous cases where state regulation has been challenged.*" (Emphasis added)

And they cite for this proposition the very cases in

which this Court has struck down state action with reference to enterprises over which the Board would assert jurisdiction.

But on what theory could any state which is "permitted to regulate" have its deprivation of "federally guaranteed rights" tested, if the basis for the state regulation is that the federal Act is inapplicable and, hence, there are no federally guaranteed rights?

The plain fact is that the doctrine advanced by the brief of the seven Attorneys General implicitly contradicts the assumption of their brief. This is shown not only in the passage quoted, but also by the examples cited, in which employers over whom the Board refuses to act discharge union members (pp. 24-25) or refuse to bargain collectively (p. 29) and in which it is argued the states should be permitted to act. In all of these cases it is implicitly assumed that the states' regulation is consistent with the provisions of Sections 7 and 9 of the Act. But the doctrine by which the brief seeks to show that the states can regulate would require no such consistency.

B. ***Changes in Standards and in the Amount of Business***

That the Board's decision not to take jurisdiction cannot be deemed to limit the substantive applicability of the Act's provisions—and thus to free the states to apply their own labor policies—is clearly demonstrated by examination of what happens (1) when the Board's standards change and (2) when changes take place in the volume of an employer's business which determine whether the Board will take jurisdiction. In both cases it will be seen that both the Board and the courts have rightly treated the Board's standards as defining only the proceedings which the Board will process, not as defining a segment of commerce to which the substantive provisions of the Act are not applicable.

(1) *Changes in Board standards.* In *Coca Cola Bot-*

tling Company of Stockton, 110 NLRB 840 (1954) the Board announced its procedure in dealing with concluded proceedings which, under the new standards, it would not have initiated. It said that as to all cases in which a decision and order had already been issued, "the Board will proceed with compliance, enforcement and contempt proceedings, depending upon the status of the case, without regard to whether the particular case meets the revised jurisdictional standards." Id at 843. The courts have concurred in the power of the Board thus to proceed. *NLRB* v. *Stanislaus Implement Co.,* 226 F. 377 (9th Cir. 1955); *NLRB* v. *Kartarik, Inc.,* 227 F. 2d 190 (8th Cir. 1955).

A Board decision, however, does more than adjudicate past violations. It directs future conduct. And so in the *Stanislaus* case the court, at the Board's request, issued an order more than a year after the Board's new standards were announced, directing a company over whom the Board would not then take jurisdiction to bargain in the future with the Machinists Union. Similarly, in the *Karatik* case, the employer was directed in November, 1955, to begin collective bargaining with the same union. Neither court even thought to question that the substantive duty thus enforced continued to survive the adoption by the Board of its restricted standards as to what cases it would prosecute.

An even clearer demonstration is supplied by *Richland Laundry & Dry Cleaners,* 112 NLRB 294 (1955). In that case the Board in 1951 had ordered the company to cease recognizing a union which had been unlawfully assisted unless and until that union had been certified. In April, 1955, the question was raised as to whether the Board should process a petition by the same union for an election, even though under the standards then in effect the Board would not ordinarily take jurisdiction. The Board decided that it would conduct an election. Pre-

sumably if the union won the election it would be entitled under the federal statute to require the employer to bargain with it. Certainly state action forbidding it to do so would present the plainest kind of conflict with federal law, even though the enterprise was clearly outside of the "segment" of commerce comprised by the Board's jurisdictional standards.

(2) *Changes in volume of business.* In administering its jurisdictional yardsticks, the Board has uniformly decided that the determinative period to be considered in measuring the employer's business is not the year in which the unfair labor practice occurred, but the calendar or fiscal year immediately preceding the year in which the hearing is held, or the prior 12 months if figures as to such a period are available. *Aroostook Federation of Farmers,* 114 NLRB 538, 36 LRRM 1611 (1955). In industries where the amount of business done fluctuates from year to year, the question of whether the Board will take jurisdiction thus depends upon the date the Board's hearing is held. Thus, in one case, the Board refused to take jurisdiction where it was shown that in the year preceding the hearing the business done by the employer had not measured up to the Board's standards, even though in a number of years prior thereto it had exceeded the standards. *Western Machine & Tool Co.,* 115 NLRB 978, 37 LRRM 1467 (1956). On the other hand, an employer cannot defend against an unfair labor practice or representation proceeding on the ground that he has sold part of his business and the portion remaining at the time the unfair labor practice occurred, or the election will be held, does not measure up to the Board's standards. *Whippany Motor Co.,* 115 NLRB 52, 37 LRRM 1234 (1956). Jurisdiction would be assumed because he had done sufficient business to meet those standards in the year prior to the hearing. Presumably, if in such a case the union delays its charge or petition until

after the close of the year, or the Board delays its hearing, then the employer, if he can show that the business in a completed year has fallen below the Board's standards, could escape the Board's jurisdiction.

These rules can be justified if it is conceded that the Board's standards serve merely to define what cases the Board will handle. They would, of course, be nonsense if it were assumed that the rules of conduct prescribed by the Act apply only where the Board's standards are met. For, if that were so, an employer whose business was increasing could be called upon to justify actions taken when he was not subject to the Act and an employer whose business was declining would be forced to comply with a non-existent duty to bargain in the future.

C. *The Nature of the Board's Standards*

One additional difficulty with the approach of the seven states and the respondents in the *Fairlawn* and *Garmon* cases is that they make certain assumptions about the nature of the Board's standards which are erroneous.

Thus, the seven states assert that the Board's standards set aside a "precisely defined segment" of enterprise which, by a strictly mathematical calculation, can be found to be outside the area in which the Board will act. This assertion, as well as the assertion that the Board's standards exclude only an area "having intrinsically local characteristics" [4] can be made only by those unfamiliar with the nature of the Boards standards.

The standards, it is true, are phrased in mathematical terms. It is also true that, under each particular subprovision of the standards, enterprises doing less than the amount of business specified are excluded and those doing a greater amount included in the cases on which the Board will act. But because of the variety of sub-stand-

[4] *Breeding Transfer Co.*, 110 NLRB 493, 496 (1954), quoted in State Br., p. 5.

ards and their complex and often undefined relationships, it does not follow either that the segment of enterprise which is excluded is precisely defined or that it is more "essentially local" than the included segment. Indeed, to the contrary, in many instances the larger the enterprise and the greater its impact upon interstate commerce the less likely it is that the Board will take jurisdiction. Furthermore, the question of whether the Board will or will not assume jurisdiction may not depend at all upon any mathematical computation relating to the amount of its business but upon the nature of the proceeding sought to be instituted before the Board or the kind of employee or employer conduct alleged to be involved.

A few examples will, we think, plainly demonstrate these characteristics of the Board's standards.

1. *Retail Stores.* One of the Board's new standards sets up specific standards for single retail stores or chains of stores located in one state. To assert jurisdiction there must be direct out-of-state purchases of $1,000,000 or indirect out-of-state purchases of $2,000,000, or direct out-of-state sales of $100,000.

Different standards, however, are applied to interstate chains. Jurisdiction will be assumed over such chains only if total sales of the entire chain are $10,000,000 irrespective of the portion which moves in interstate commerce, unless the stores in each state meet the intra-state standard. It is plainly possible for a single store (or a group of stores) within one state to meet the *intra*-state standard even though the chain of which it is a part does not meet the *inter*state standard. In this situation, the Board will still refuse to entertain a representation case in which a union asks that an election be conducted in the *interstate* enterprise. *Deskins Super Market,* 115 NLRB 1571, 38 LRRM 1121. But, on the other hand, if the same union should file a petition asking for an election only in one store, or only in the stores in one state, *in the*

same chain, and the first standard is met, the Board will entertain the petition and conduct an election in this smaller unit. *Greenberg Mercantile Corp.,* 112 NLRB 710 (1955); *Missco, Inc.,* 116 NLRB No. 163, 38 LRRM 1441 (1956).

2. *Multi-state non-retail enterprises.* The same kind of a situation was presented to the Board recently in connection with multi-state non-retail businesses. The numbers, in the case of non-retail businesses, are different than in the case of retail stores. But the same duality of standards exists. And, so, in *Dixie Coca Cola Bottling Co.,* 116 NLRB No. 38, 38 LRRM 1244 (July 25, 1956) the Board declined to conduct a company-wide election in an interstate enterprise even though it expressly conceded that, in an appropriate proceeding, it might assert jurisdiction over the portion of the employer's operations in a single state. *Id* at 38 LRRM 1245.

In neither this category nor in the retail chain store category has the Board decided, so far as we know, how it will handle unfair labor practice cases which occur before a bargaining unit is established. If an employee is discharged for union membership and files a charge with the Board, will the Board apply the standard for the store or plant in which he worked, all of the stores or plants in the state, or all of the stores or plants in the chain? Perhaps it will make the answer depend upon the degree of centralization of control over labor relations matters—as in the corporate entity cases discussed below. If so, it may very well be that the charge will be entertained if the employee was discharged by a local manager having considerable autonomy in formulating labor relations policy but dismissed if the discharge was pursuant to a policy applicable to the entire interstate operation.

3. *Secondary Boycott Cases.* If an employer files a

charge that a union has violated Section 8(b)(4) of the Act by engaging in a secondary boycott, the Board will take jurisdiction if the total business of all of the affected employers, lumped together, meets the standards which are otherwise applied to single employers.

Thus, if a union should petition for an election among the employees of employer A, the Board would refuse to take jurisdiction if A's business did not meet the Board's standards. If the union, in order to obtain recognition, then exerted secondary economic pressure upon Employer A by persuading the employees of employer B not to handle his goods, the Board would take jurisdiction over a complaint against the union if the business of employer A and B together add up to the total requirement by the Board to take jurisdiction. If the boycott involves a number of employers, all of their businesses will be similarly lumped together. *Teamsters' and McAllister Transfer, Inc.*, 110 NLRB 1769 (1954).

The result of this rule is plainly to make the Board's assertion of jurisdiction depend upon the kind of a charge filed with it. The Board will not hear a simple refusal to bargain case or a discriminatory discharge case with respect to any of the involved employers. But it will hear a a charge that there has been a secondary boycott and, in that event, will also hear any charges of employer unfair labor practices which may be involved in the same labor dispute. *Reilly Cartage Company*, 110 NLRB 1742 (1954).

4. *Employer Associations.* If there is in existence an employer association which bargains as a unit with a union the Board will permit the business of all of the members of the association to be added together in determining whether the jurisdictional standards are met. However, under established Board rule, an employer may take himself out of such a bargaining unit by the simple

device of resigning from the association.[5] The question then, in dealing with a proceeding involving the employees of a particular employer, may be whether he has manifested an intention of being a member of an employer association for purposes of collective bargaining. If he has, the Board will take jurisdiction.[6] If he has not, or if he has resigned from the association, the Board will refuse jurisdiction in the absence of any showing that the business of the individual employer is sufficient to meet the Board's standards.[7] Whether or not the Board would take jurisdiction cannot be ascertained from the employer's business but only from the evidence as to his relationship with the association at the time the unfair labor practice occurs.

5. *Public Utility and Transit Companies.* One of the bases upon which the Board will assume jurisdiction is the provision of goods or services in the value of $100,000 or more to enterprises which directly meet the Board's interstate commerce standards.

This is the so-called "indirect outflow" or *Jonesboro Grain Drying*[8] standard. The Board also has a specific limitation, known as the *Greenwich Gas*[9] standard, that it will not take jurisdiction over a transit company or other public utility unless it grosses $3,000,000 a year. What of the case in which a transit company or public

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[5] See, e.g., Bearing & Rim Supply Co., 107 NLRB 101 (1953) and cases cited in Truck Drivers Local Union v. N.L.R.B., 281 F. 2d 110, 115 (2d Cir. 1956) cert. granted No. 103, October Term, 1956, 352 US 818.

[6] Insulation Contractors, 110 NLRB 638 (1954).

[7] Carpenters Union (Ellinwood Corp.) 115 NLRB 43, 37 LRRM 1229 (1956). In this case a complaint against union unfair labor practices was dismissed because the record did not show that at the time of the commission of the acts the company had "manifested an unequivocal intent . . . to participate in . . . multiemployer bargaining."

[8] 110 NLRB 481.

[9] 110 NLRB 564 (1954).

utility provides goods or services valued at more than $100,000 to an enterprise over which the Board would exercise jurisdiction? Will the indirect outflow standard be utilized as a basis for asserting jurisdiction even though the company does not meet the standards for a public utility or a transportation company?

The answer, it seems, depends in some cases upon whether the only impact of the operation of the company involved upon the community is its provision of services to the interstate employer. If the company, as in *Potash Mines Transportation Co.*, 116 NLRB No. 179, 38 LRRM 1460, performs services only, or in major part, on a private basis for the interstate enterprise then the Board will assume jurisdiction. If, on the other hand, the company serves a broader section of the community and its services for particular employers, although as much as in the first case, are only part of its total public service, then the Board will not assert jurisdiction. "If the Greenwich Gas standard applies, the standard enunciated in Jonesboro . . . do not." *East Newark Realty Corp.*, 115 NLRB 483, 37 LRRM 1328, 1329 (1956).

Similarly, if an enterprise supplies coal or water, or any other materials or services in the amount of more than $100,000 to interstate industrial firms, the Board will assert jurisdiction. But, if it in addition supplies these same materials or services on a public basis to the community in general, jurisdiction will be refused. *Gary Hobart Water Corp.*, 115 NLRB 1575, 38 LRRM 1123 (1956).

On the other hand, if water, steam and electricity are supplied on a private basis by a firm which does not offer its services to the general public but supplies them in connection with the lease of an industrial building to manufacturers subject to the Act, then the $3,000,000 public utility standard, not the *Jonesboro* standard, will be applied. *East Newark Realty Corp.*, 115 NLRB 483, 37 LRRM 1328 (1956).

6. *Restaurants and Cafeterias.* The distinction which the Board draws between private utilities (except lessors) and public utilities it refuses to draw in the case of restaurants and cafeterias. In such cases, the Board refuses to apply its direct and indirect inflow standards with reference to the enterprise's own purchases, or the indirect outflow standard with reference to the services supplied to an interstate manufacturer. Instead, the Board uses the standard applicable to retail stores, viz: a gross business of $10,000,000 annually.[10] And this standard is applied even to industrial catering enterprises whose only business it is to supply in-plant meals on a contract basis to manufacturers engaged in interstate commerce. Thus, a concern which washes windows in an industrial plant engaged in interstate commerce, at a cost of $100,000 or more, is subject to the Board's jurisdiction, even if none of its own business is interstate.[11] If the service is a public utility, however, the Board will not take cases involving it unless its total business is $3,000,000. On the other hand, if it prepares and serves food, even on a private basis, the Board will not take jurisdiction unless the gross business is $10,000,000 even though the enterprise itself purchases goods valued at more than $1,000,000 shipped directly and indirectly from out-of-state and it does no business with the public generally. *C. R. Brown Cafeterias,* 115 NLRB, 1772, 38 LRRM 1166 (1956).

7. *Inter-related and Subsidiary Companies.* Where several corporate entities are involved in the same general business enterprise, it is almost impossible to tell whether the Board decision to assert jurisdiction will be based on the aggregate business of the separate corporate entities or whether they will be separately considered. The Board sometimes decides both ways with respect to the same enter-

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[10] Bickford's Inc., 110 NLRB 1904, 35 LRRM 1341 (1954).

[11] City Window Cleaning Company, 114 NLRB 906, 37 LRRM 1062 (1955).

prise. Compare *Orkin Exterminating Co.*, 115 NLRB 622, 37 LRRM 1365 (1956) with *Orkin "The Rat Man", Inc.*, 112 NLRB 762, 36 LRRM 1102 (1955). That the various corporations are integral parts of the same business, have common ownership and control, and even common officers and directors, is not necessarily sufficient to show that they should be considered together. *Moving Picture Machine Operators*, 115 NLRB 952, 37 LRRM 1450 (1956). The Board has looked rather at questions of whether there is centralized control of labor relations matters or employee interchange—questions which are normally relevant in determining the appropriate collective bargaining unit.[12] See Murdock dissenting, in *Orkin Exterminating Co., supra*. A given corporate combination, therefore, can either be within or outside the Board's standards depending upon whether it is decided to have one labor relations director for the group or to have several. And this status can, of course, change from time to time irrespective of any change in the combine's total business or its effect upon interstate commerce.

8. *Conclusion.* This brief excursion into the intricacies of the Board's standards should serve to demonstrate conclusively that the Board's new standards do not carve out any segment of commerce, local or otherwise, from the Board's jurisdiction. It is impossible to identify the enterprises or the employees excluded by the Board's standards. It is possible only to say, and this without any precision, that the Board will not entertain certain proceedings. Whether the Board will take jurisdiction may depend upon the nature of the proceeding, the date of the hearing, the manner in which the enterprise's labor relations policies are formulated and implemented, the past history of collective bargaining, the unit asked for, or the kind of unfair labor practice charged.

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[12] The test is, of course, never applied in determining whether to take jurisdiction over a single corporation, which may have hundreds of separate bargaining units within the individual corporate enterprise.

Nor is it true, even with respect to these questions, that the Board's standards "have remained static" since 1954, as stated by the respondent in the *Fairlawn* case (Brief, p. 67). There have been innumerable changes in the 1954 standards since they were first adopted.[13] As the Board has itself recently reiterated, the Board in 1954 indicated that its standards covered only "a number of typical situations then presented for decision" and "as additional typical cases arose, the established standards would be re-evaluated and additional standards would be established . . ." *Coca Cola Bottling Co. of New York*, 114 NLRB 1423, 37 LRRM 1176, 1177.

Finally, examination of the standards and their method of application makes it crystal clear that no state court can

[13] Thus, the Board announced in July, 1954, that it would never take jurisdiction over restaurants. On December 16, 1954, however, it decided that it would take jurisdiction if the employer's gross volume of sales annually was $10,000,000. Bickford's Inc., 110 NLRB 1904. In January, 1955, the Board decided that rural electric cooperatives were analogous to public utilities and that its public utility standard should therefore be applied to them. Clay Electric Cooperative, Inc., 111 NLRB 175. Then, in August, 1955, it decided that jurisdiction would be taken with respect to such cooperatives if they met the Jonesboro tests, even though not the public utility test, if their business was wholesale rather than retail. Central Electric Cooperative, 113 NLRB 1059. In December, 1955, the Board decided that it would assert jurisdiction over multistate, non-retail enterprises which did not meet its July, 1954 standards as to interstate sales if such enterprises grossed $3,500,000—an entirely new standard. Coca Cola Bottling Co., 114 NLRB 1423, 37 LRRM 1176. In January, 1956, the Jonesboro standard was revised by dropping the distinction between sales of goods and services "directly utilized" by a purchaser and other sales. In the former case the minimum sales requirement was originally $100,000, in the latter $200,000. From and after January 12, 1956, only $100,000 was required in either case. Whippany Motor Co., 115 NLRB 52, 37 LRRM 1234.

In addition to these decisions which expressly changed the texts of the standards, there were innumerable decisions which, by the process of creative interpretation, substantially changed their impact. See, e.g., Reliable Mailing Service, 113 NLRB 1263 (1955); Tanner Motor Tours, Ltd., 112 NLRB 275 (1955); Local 1976 (Sand Door and Plywood Co.), 113 NLRB 1210 (1955).

possibly be competent to predict with any certainty whether the Board will or will not take jurisdiction over any particular proceeding. The Board's rules are not only changeable. They are also extremely complex, even in cases where the applicable principles are not in controversy.

So that the Court may have some idea of the kind of reasoning involved in actually applying the Board's standards we reprint, as appendix A to this brief, the text of the Board decision in *Star Garter Co.*, 114 NLRB 957, 37 LRRM 1071, a relatively non-controversial case in which established Board principles were applied. As a realistic matter, it would be only coincidence if a state court *nisi prius* judge who is asked to determine, without benefit of a prior Board ruling, whether the Board would take jurisdiction in such a case would come out with the same answer as the Board. It is not only that the reasoning is esoteric. The source of the "law"—the texts of the Board's decisions—is also frequently unavailable to such courts. And the actual decision, even if the principles are understood, may depend on how much specific information can be procured in the particular proceeding about business enterprises not even involved as parties. The Board's so-called jurisdictional rules, in sum, resemble the statutory principles which the Board enforces, gaining specific content only as they are applied on a case-by-case basis.[14]

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[14] The truth of this observation is borne out by the fact that although the Board's standards were adopted in mid-1954, and have since been enforced in the Board's regional offices so that no cases not meeting those standards should have been processed to the Board, still in 1956 the Board has decided more than 30 cases involving jurisdictional points of more than a routine nature. This total was arrived at by counting the cases deemed to have general enough significance by the Bureau of National Affairs to be designated in their Labor Relations Reference Manual as being "Significant Rulings." The total number of cases reaching the Board itself which involve decisions based on its jurisdictional standards is presumably much larger.

There is a very real and substantial possibility of conflict, therefore, if the states are to be free to make the initial determination as to whether a given case meets the Board's standards. And we therefore conclude that if the states are to handle any cases which the Board refuses to process there should be, at the very least, a decision by the Board or by one of its regional offices that the case will not be handled. Certainly if there is any controversy as to whether a particular proceeding would or would not be processed by the Board that controversy should not be resolved in a state proceeding subject only to review in this Court.

II—TO INSURE CONSISTENCY WITH THE FEDERAL ACT IN CASES WHICH THE FEDERAL BOARD REFUSES TO HANDLE IT IS NOT ENOUGH TO LIMIT STATE ACTION TO THE PROHIBITION OF CONDUCT UNPROTECTED OR FORBIDDEN BY THE FEDERAL ACT.

As a result of our argument so far we conclude: (1) that it is impossible to equate the Board's "jurisdictional" standards with a definition of the scope of the Act's substantive coverage; (2) that the basic principles and the rights conferred by the Act must be regarded as governing all enterprises within its statutory scope, irrespective of the Board's refusal to police violations of those rights in some cases; and, finally, (3) that the Board's standards are such as to make it clearly impossible for any other agency than the Board itself to determine routinely whether a particular proceeding will or will not be heard by the Board.

These conclusions, however, are not sufficient to define the answer to the question posed by this case and the *Fairlawn* and *Garmon* cases. Suppose that, as in this case and arguably perhaps in the *Garmon* case, it can be shown that the National Board, or its duly designated agent, has declined to take jurisdiction over the particular controversy. Suppose further that, again as in this case and perhaps arguably in the others, it also can be shown that the particular conduct

which the state is seeking to prevent or to punish is conduct which the Board, if it took jurisdiction, either (a) would not protect under Section 7, or, *a fortiori* (b) would itself prohibit as an unfair labor practice under Section 8? Where is the possibility of conflict between state law and the federal policy in such cases? Why should not this Court say that if these two criteria are met, as they clearly are in this case, the state action can stand?

There are two difficulties. One of them has already been admirably stated in the *amicus curiae* brief of the AFL-CIO. This is that the precise limits of the substantive protections and prohibitions of the Act are necessarily indeterminate. The Act provides merely general principles whose exact meaning only appears as the Board applies them to particular cases. If state action is to be tested, on a case-by-case basis, by whether it restricts substantive rights conferred by the federal statute, then each state court or board must necessarily determine, in each such case, the contours and limits of the federal statute, with federal review only, and in the first instance, in this Court.[15]

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[15] The nature of the difficulty thus created can be illustrated by exploring one small segment of this problem: the use of vulgar language on a picket line.

One kind of conduct which the Board has recently called "unprotected", in addition to slowdowns, concerted refusals to work overtime, the distribution of "indefensible" leaflets, and similar activity, is the use of coarse or vulgar language. In *NLRB* v. *Longview Furniture Co.*, 206 F. 2d 274 (4th Cir. 1953) the Fourth Circuit refused to enforce an order of the Board ordering reinstatement of certain employees saying that the Act did not "protect them in using insulting and profane language." The Board has taken this ruling to its bosom (*Nutone, Inc.*, 112 NLRB 1153 (1955), *enforced as modified, Steelworkers* v. *NLRB*, 39 LRRM 2103 (D.C. Cir., 1956); *American Tool Works*, 116 NLRB No. 247, 39 LRRM 1072 (1956)), despite earlier contrary judicial decisions. (See, e.g., *Republic Steel Corp.* v. *NLRB*, 107 F. 2d 472, 479 (3d Cir. 1939), *cert. denied*, 389 U.S. 684.

One difficulty with the Board's new rule is that no one without access to the Board's files can tell where the line is. The Board has neither published a lexicon of permissible usage nor even stated in its

The second and perhaps the more important difficulty is that a showing that the particular conduct proceeded against by the state in a given case is unprotected or forbidden by the Act is not sufficient to show that the state is enforcing a policy consistent with the Act. It is not so sufficient because the prohibitions and protections of the Act constitute a mutually inter-dependent system each part of which was enacted in the light of and in reliance upon the existence of the other parts.

The judgment of Congress or the Board that a particular kind of conduct should be protected or prohibited is not made by considering that kind of conduct in isolation from other regulation but only in the context of the whole system of rights and remedies provided by the federal statute. Both employers and the Union use many methods for achieving their objectives. What Congress purported to do was to establish the rules, to outlaw certain practices and to pro-

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published decisions the language found to be impermissible. The best one can do is to find this kind of statement:

> "Thus, in *Efco Mfg. Co., Inc.*, 108 NLRB No. 52, 33 LRRM 1516, 1518, decided April 15, 1954, the Board drew the line between the following two cases, ordering reinstatement in the first one and denying it in the second: (a) The striker called a non-striker a 'wop-bastard,' challenged a company official to a fist fight as a means of settling the strike, and called him 'yellow' when he failed to accept the challenge. (b) The striker ascribed to a non-striker the capability of committing an act so foul as to be unmentionable.
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> "Those criteria may properly be applied to the present case, as representing the latest views of the Board (though they do not, of course, constitute a precise or complete standard covering the full field of misconduct via profane and indecent language)." Nutone, Inc., 112 NLRB 1153, 1172 (1955).

If the standard to test state action is to be whether it interferes with activity protected by the federal Act, the question of state jurisdiction in any case in which there is picketing accompanied by vulgar language may depend upon whether the language used more closely resembles "wop-bastard," in which case it is protected, or resembles the capability of committing an act so foul as to be unmentionable, in which case the state can act.

tect others, and thus to channel the course of industrial controversy into the forms believed fairest and most conducive to the general welfare. Certain practices were prohibited because other means of achieving their objectives were made available and, indeed, were protected. Giving force to the prohibition without at the same time offering the counterbalancing protection distorts the Congressional scheme as much as a prohibition of conduct which Congress has protected.

Consider, for example, the provisions of Section 8(b)(4)(B) of the Act prohibiting the use of the secondary boycott to compel an employer to recognize a union not certified by the Board. If employer A refuses to recognize a union and the union then seeks to secure recognition through a refusal by the employees of employer B to handle A's products, the union's actions are clearly an unfair labor practice and may be, and indeed must be, enjoined by the Board under Section 10(1) of the Act.

But it is equally clear this prohibition of the secondary boycott was enacted by Congress only on the expressed premise that the rights of the employees of employer A to organize and bargain collectively was protected by the Act. Hence any use of secondary pressure instead of the election and unfair labor practice procedures of the Act was believed to be unjustified.

Thus, in the debates on the Taft-Hartley Act, Senator Pepper objected to the provision against secondary boycotts, citing the case in which a lumber manufacturer had refused to recognize a union and discharged the employees who sought to organize one. He argued that it was improper in such a case to prohibit the employees of a processing company from refusing to process the lumber manufactured by the first employer. Senator Taft answered this objection by pointing out that "the Senator's first assumption is not correct, because under the Wagner Act the workers have the right to organize and to require the employer to bargain

with them; and if the employer fails or refuses to do so, his action in that respect is an unfair labor practice.[16]

Even Senator Morse, who opposed the other secondary boycott provisions of the Act, supported a prohibition of "a secondary boycott designed to force an employer to recognize a union." "By this device," he said, "labor unions attempt to organize employer A by bringing economic pressure to bear upon employer B. It seems to me that with the democratic election machinery of the Wagner Act available, and with the provisions according federal protection to employees in their efforts to organize, it is no longer legitimate for labor to engage in this type of conduct." [17]

The secondary boycott is only one example. The use by a union of slowdowns and other tactics said by the Board to be "unprotected" by the Act surely must be differently regarded in the context of a statute preventing an employer from discriminating against strikers than in the absence of such protection. And the use of threats against an employee if he does not join a union—which the federal Act prohibits—can hardly be said to be contrary to the national labor policy if the employer is permitted to threaten employees that they will lose their jobs if they *do* join.

It is not sufficient, therefore, to say that in a particular case the union conduct, such as a secondary boycott, which an employer seeks to prevent in a state proceeding is not conduct protected by the federal Act. Such conduct may have resulted from prior actions which, if the federal Act had been applied, would have been forbidden. Denied recourse to the remedies provided in the federal Act by the refusal of the Board to act, unions may often be compelled to use, as a substitute, methods of self-help which have been placed outside the protection of the federal Act or forbidden by it precisely because the federal Act itself provides other remedies. If the state does not provide those

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[16] 93 Cong. Rec. 4198.

[17] 93 Cong. Rec. 1844.

remedies, the net effect of its action against the use of self-help is to make applicable, in that state and to unions covered by the provisions of the federal Act, a policy which contradicts that of the federal Act.

That these considerations are not purely hypothetical is illustrated by the facts in the *Fairlawn* case and by the brief which the Attorneys General of Florida, Georgia, Texas, Vermont, Virginia, Wyoming and Wisconsin have filed in support of the validity of state action in this area.

There can be no question that in *Fairlawn* the union actions which the state seeks to prohibit followed, and were a result of, employer actions in violation of the federal Act. But Ohio provides no remedy for employer interrogation of employees as to their union affiliation, or for a refusal to bargain. Nor does it provide any mechanism by which employees can register by secret ballot their desire to be represented by a union. It prohibits only the union reaction to the lack of such provisions.

Even more startling is the position set forth in the brief of the seven states. The brief poses a hypothetical case:

> "Let us suppose that such a [rural electric] cooperative declines to bargain with a labor organization representing its employees—a real possibility, because there still remains some unwillingness in unindustrialized rural areas to deal with urban labor representatives. The employees could have no remedy under the federal law. If they are precluded from a remedy under state law they have no recourse but to resort to industrial strife, which it is the avowed purpose of Congress to prevent." (States Brief, p. 29.)

What remedy under state law? As far as we can determine, only Texas and Wisconsin, of the seven states, provide any method by which a union can obtain an election to determine its majority status. And, in Texas, such an election can be held only as a defensive measure in a proceeding

instituted to enjoin picketing after a strike had been called.[18] Only Wisconsin provides an affirmative remedy by which a union can compel an employer to engage in collective bargaining.[19] And, in the given case of an electric supply cooperative, Wisconsin would completely forbid any strike and require compulsory arbitration.[20]

To be sure, the other states have laws relating to labor relations matters. Georgia, for example, has statutes forbidding mass picketing, "unlawful" interference with an employer's business, and picketing to compel recognition of a union.[21] But it has no statutory procedure for the protection of the right to collective bargaining. No employer can be compelled to recognize a union or bargain with it, no matter how many employees choose it.

Virginia has laws, too. They provide for the seizure of public utilities if a strike should occur,[22] they prohibit the use of insulting language on picket lines,[23] they prohibit picketing by anyone other than an employee,[24] they prohibit strikes by government employees,[25] and they limit union action in other ways. But Virginia has no statute protecting the right of employees to organize and to bargain collectively.

Florida, as the AFL-CIO has pointed out in its brief, not only has no statutory procedure for conducting secret elections. It will not even permit its judges to appoint commissioners to hold such elections as an adjunct to a suit to enjoin picketing alleged to be by a minority union.[26]

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[18] Tex. Rev. Civ. Stat. Ann. Art. 5154(g) (1955), Cha. 387, Laws of 1955, approved June 3, 1955, § 3.

[19] Employment Peace Act, Wis. Stat. (1953) §§ 111.01-111.19.

[20] Wis. Stat. (1953) §§ 111.50-111.64.

[21] Ga. Code Ann. §§ 54-801—15-805. See *Woodward* v. *Collier*, 210 Ga. 239, 78 S.E. 2d 526 (1953).

[22] Va. Code Ann. §§ 56-509—56-528.

[23] Va. Code Ann. § 40-64.

[24] *Id.*

[25] Va. Code Ann. §§ 40-65—40-67.

[26] *Thomas Jefferson, Inc.* v. *Hotel Employees*, 80 So. 2d 583, 37 LRRM 2338 (Fla. 1956).

These examples are sufficient, we believe, to illustrate the error not only in the brief of the 7 Attorneys General but also in any general proposition that state action should be sustained in a particular case if it does not transgress substantive rights protected by the federal statute. Such a requirement is necessary, we concede, to show that the state is not seeking to thwart the national labor policy. But it is not sufficient. To show true consistency with the national labor policy it must also be shown, at the very least, that the state not only punishes what the federal Act prohibits but also provides the necessary counterbalancing protections which the federal Act provides.

III—SECTION 10(a) OF THE ACT PRECLUDES THIS COURT FROM PERMITTING THE STATES TO ACT EVEN IN CASES SUCH AS THIS ONE WHERE THERE IS NO INCONSISTENCY WITH THE OTHER PROVISIONS OF THE FEDERAL ACT.

Our analysis so far still does not necessarily require the conclusion that state action of the kind involved in this case should not be permitted to stand.

In this case—although not in *Garmon* or in *Fairlawn*—we have (a) a specific refusal by the national board to proceed, (b) action by a state board which is fully consistent with the federal Act, and (c) a comprehensive labor relations statute which, although it does not exactly correspond with the national Act, does provide at least a guaranty of the basic rights provided for in Sections 7 and 9. We have further, provision for administration of that statute by a single administrative board presumably more competent to understand and, hence, to respect the niceties of the federal statute than a host of common law *nisi prius* courts.

Why cannot the Steelworkers urge that this Court should rely upon these factors, distinguish the *Garmon* and *Fairlawn* cases, and sustain the action of the Utah Labor Relations Board in this case? Aside from the Union's particular

interest in obtaining relief in this case, there is the Union's more generalized interest in having state procedures available to it in all of the cases which the national Board refuses to process under its new standards. Although it is impossible to generalize, it is probably true that in at least some of the states which have enacted comprehensive labor statutes, the Union has more to gain from their operation than it has to lose. Certainly the Steelworkers have no great interest in seeing the Utah statute rendered inapplicable to the broad range of cases over which the National Labor Relations Board has now abdicated its jurisdiction.

The Union would, therefore, welcome a decision along the lines we have suggested, striking down state action such as that involved in the *Garmon* and *Fairlawn* cases and upholding, as consistent with the national labor policy, the action of the Utah Board in this case because it complies with the three conditions we have stated.

We do not argue for this result, however, because we cannot avoid the conclusion that it is precluded by the terms and legislative history of Section 10(a) of the Act.

The three conditions which we think are necessary to establish that state action is not in conflict with the national Act—(1) that the national board has specifically declined to proceed, (2) that a state labor relations statute exists which protects the basic rights guaranteed by the federal Act, and (3) that the particular application of that statute is not inconsistent with the federal Act—are almost the exact counterparts of the restrictions in the proviso of Section 10(a). Section 10(a) permits the states to take jurisdiction if (1) the national board has made a specific agreement to that effect, (2) the state has a labor relations statute consistent with the federal Act, and (3) that statute has not been construed inconsistently with the federal Act.

There are only two differences. The proviso requires that the State acquire jurisdiction by agreement with the Board, not by refusal of the Board to act. And it requires,

as a condition of such agreement, that the state statute be fully consistent, throughout, with the amended federal statute. We see no way to avoid the difficulty that in asking the Court to uphold Utah's action on the basis we have set forth we would be asking the Court to accomplish almost exactly what Congress intended, but by a method different than the one which Congress specified and with somewhat less rigorous restrictions.

That Congress intended the proviso in Section 10(a) to be the method, and the only method, of dealing with the problem of "cases in border-line industries (i.e., border-line insofar as interstate commerce is concerned)" is irrefutable. After all, these are the words which the Senate Committee which drafted the provision used in its report.[27] And this is what the so-called "watch-dog" committee, which contained the principal sponsors of the 1947 amendments, concluded the provision meant.[28] And this is what both the majority and minority in each of the committees of succeeding Congresses which has dealt with this problem has assumed it meant.[29] To present responsible argument to the contrary, however desirable the result, seems to us to be plainly impossible.

We conclude, then, that the federal Act must be read as being substantively applicable to the cases which, while within its coverage, the Board refuses to process. We conclude further that there is such a possibility of conflict with the policy and the provisions of the Act that state action which would not be permissible if the Board would act can be sustained in the cases in which the Board refuses to act only if there is (1) a refusal by the Board to act in the spe-

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[27] S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 26.

[28] S. Rep. No. 986, 80th Cong., 2d Sess., pp. 30-31 (quoted in the brief for petitioners in No. 41, at pp. 80-81).

[29] See S. Rep. No. 99 on S. 249, 81st Cong., 1st Sess., p. 43 (majority views), Part 2, p. 8 (minority views); S. Rep. No. 1211, 83rd Cong., 2d Sess., pp. 17-18 (majority views), Part 2, pp. 14-15 (minority views).

cific case, (2) a labor relations statute providing protection for the basic rights guaranteed by the federal Act, and (3) an absence of conflict with the substantive provisions of the federal Act in the particular application of the state statute. We conclude, finally, that Congress recognized this in 1947 and provided the mechanism by which states could enforce their own laws in cases which are "border-line insofar as interstate commerce is concerned" and, regretfully, we confess that, this mechanism not having been used and the stringent limitations which Congress insisted upon not having been complied with, the action of the Utah Labor Relations Board in this case, although it conforms in other respects to the national policy and presents no possibility of substantive conflict with it, cannot stand.

In coming to this conclusion, we do not share the view of others that the situation thus created is catastrophic. First of all, a remedy for the really pressing cases—the area which the Board has recently abdicated—is readily at hand. The Board can undo what it has done.

This is not as difficult or as unlikely as it may first appear. As to difficulty, the plain fact seems to be that the Board's new jurisdictional standards were not adopted to meet any pressing shortage of funds or inability to handle its case load. That case load was not substantially higher in 1954 than it was in 1950. There was no serious backlog of cases either in Washington or in the field.[30]

Why, then, did the Board adopt its new standards? Plainly because those members who voted for the change wished to accomplish what Congress had said could not be done—the cession of jurisdiction to states not having labor relations laws consistent with the federal Act.

In this connection, a few lines of history are worth many adjectives. In January 1953 a Republican administration

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[30] See the dissent of Member Murdock in Breeding Transfer Co., 110 NLRB 493, 515-518 (1954).

was inaugurated, with the "underlying philosophy," as stated by one of its appointees to the Board, "that the States and communities not only should, but must assume and discharge the responsibility for local affairs." [31] New appointments to the Board followed as the terms of sitting members expired. In July 1953, Chairman Farmer took office. In August 1953, Member Rodgers took office. Finally, in March 1954, Member Beeson took office. This completed the necessary majority and in July 1954 the new standards were adopted, over the dissent of the other two members.

In the interim, Chairman Farmer and Member Rodgers were not averse to stating publicly what their views were. In January, 1954, Chairman Farmer made a speech saying that he strongly advocated a withdrawal of NLRB jurisdiction so that there would be a revival of interest by local government in solving the problems of local people. Member Rodgers in March, 1954, publicly urged that the first task of the new members of the Board should be to free itself of hundreds of cases which should be dealt with by the localities and the States.[32]

The actual decisions of the Board which announced the new standards were, of course, more circumspect. But the sequence of events and the nature of the Board's new standards strongly suggest the correctness of the conclusion, which Member Murdock drew in his dissent in the *Breeding Transfer* case,[33] that the purpose of the new standards was to permit the states to act in cases which the new Board members thought appropriate for state action. Indeed, the Board's standards themselves make it clear that they are not based on any attempt to separate business which is primarily local from business having a substantial effect on commerce. The

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[31] Member Rodgers, quoted in Member Murdock's dissent, *supra*, at p. 503.

[32] The speeches are set out in fuller detail in Member Murdock's dissent in the Breeding Transfer case, 110 NLRB 483, 502-503.

[33] *Ibid.*

only rational explanation, for example, for the Board's refusal to apply its $50,000 direct outflow standard or its $100,000 indirect outflow standard to public utilities, although it does apply them to non-public utilities, is that it is more appropriate that the states govern labor relations matters in the former case since such utilities are otherwise closely regulated by the state while non-public suppliers are not. Certainly no distinction can be drawn between them in terms of their effect upon commerce.

Nor have the new standards, by all evidence, substantially lightened the work load of the Board. To the contrary, the astonishing complexity of the standards and the number and variety of decisions interpreting, applying and revising them, as well as the substantial number of dissents, makes it reasonable to guess that as much time has been used at the Board level in debating about the jurisdictional standards as would have been used in deciding all of the cases which the Board now refuses to take, the great majority of which would have been routinely disposed of on the merits. And it is also not unreasonable to guess that the same proposition holds true in the regional offices of the Board, where most cases are in fact disposed of. Instead of handling cases, the time of the Board's personnel has been involved in the intricate discovery and application of standards adopted by the Board to avoid handling cases.

If this Court should hold, as we believe it must, that this attempt to turn power over to the states without benefit of recourse to Congress cannot succeed, the Board will have no great difficulty in reassuming jurisdiction over the area from which it has withdrawn. And if we are correct as to the underlying reason for the original action, its failure to achieve the desired transfer of power will make it not only easy but likely that this will occur.

As for the remaining and we believe relatively unimportant area, over which the Board never asserted jurisdiction, we do not share the view that great distress will be

created, even in the absence of Congressional action. The states, this Court has now decided, have power to enforce regulations regarding violence and physical force both through the traditional methods of the criminal and civil law and through their labor relations statutes.[34] Their inability to regulate the use of purely economic weapons against employers and, contrariwise, to protect the rights of employees and unions, will, to be sure, prevent states which have labor policies approximating the national policy from effectuating such policies. It will also, on the other hand, prevent states whose labor policies consist simply of restrictions against unions, without any counterbalancing rights, from enforcing those policies. In such states the absence of any control is far preferable to the imposition of regulations which fly in the face of the national policy.

Moreover, we do not necessarily discount the power of the Board to do what it has not yet attempted to do—give specific content for the purpose of this statute, by regulation or otherwise, to the broad term "affecting commerce" so as to fix with some precision the limits of the Act's coverage and make a serious effort to obtain the funds necessary to administer the included area. The Board has not attempted this so far. Instead it has explicitly refused to process cases which are clearly within the confines of its statutory jurisdiction.

We have assumed throughout that the Board has power so to proceed. We wish to make it clear that this assumption is for purposes of argument only. We think there is a serious question as to whether the Board can use its undoubted discretionary powers to proceed under Section 10 as a method of implementing a policy directly contrary to the Congressional mandate that jurisdiction can be ceded to the states only by cession agreements conforming to the requirements of Section 10(a). We think there is an even more

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[34] *Auto Workers* v. *Wisconsin Board*, 351 U.S. 266 (1956).

serious question as to whether the Board does not violate Section 9(c)—which says that the Board "shall" conduct elections when it finds that a question of representation affecting commerce exists—when it deliberately refuses to conduct such elections even though it concedes that a question of representation affecting commerce does exist. We think, finally, that there is real doubt whether the Board had the right to ignore the Administrative Procedure Act in adopting the new standards. The standards were adopted *in camera* on the basis of a secret staff study, announced in a press release, and then applied to cases in which the question of jurisdiction had not been briefed or argued.

The present cases do not present the question of whether the Board has or has not exceeded its statutory powers But a decision of this Court that the objectives sought to be accomplished by the Board—the transfer of jurisdiction to the states—cannot be accomplished may go far toward avoiding the necessity of such a decision. For if those objectives are not realized we may at least hope that the Board will not persist in its present course.

Respectfully submitted,

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APPENDIX A

(Note: We reprint below the full text of the Board decision in *Star Garter Co.*, 114 NLRB 957 (1955). This decision does not represent any new, controversial or even significant application of the Board's 1954 standards. It was little noticed when decided and will undoubtedly be little noticed hereafter. We reprint it here because we believe that only by experiencing the full text of a Board decision under its new standards can the complexity of those standards be fully appreciated.

Star Garter is, of course, not typical of every Board decision under the 1954 standards. We are reasonably sure, however, that it does fairly represent the kind of reasoning which is often involved in the application of those standards. And we are completely confident that it would have been the most unlikely kind of coincidence if a state court, whose jurisdiction had been invoked prior to the Board decision, would have come up with the same kind of an answer as the Board ultimately gave.

Star Garter Company And Local 444, United Textile Workers Of America, AFL, Petitioner. Case No. 13-RC-4222. November 10, 1955

DECISION AND ORDER

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, hearings were held before Albert Kleen, hearing officer. The hearing officer's rulings made at the hearings are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

No question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act, for the following reasons:

The Employer is an Illinois corporation engaged in the manufacture and sale of infants' and women's wear, with its sole place of business in Chicago, Illinois. Its total sales during the calendar year 1954 amounted to $137,521. During the same period, its purchases totaled $68,862, of which about 80 percent was received directly from points outside the State of Illinois.

During this period out-of-State sales totaled $22,665, of which $2,401 went to unidentified customers and $20,254 were in shipments to Sears Roebuck stores located in other States. All remaining sales were shipments to purchasers located in the State of Illinois. To local customers whose annual out-of-State shipments fell short of $50,000, sales totaled $6,284. To Illinois customers—nonretail enterprises—each of whose direct out-of-State shipments exceeded $50,000, sales totaled $30,459. To the Illinois warehouse of Spiegel's, Inc., passingly referred to in the record as a mail-order house, sales amounted to $58,667. And to Sears Roebuck in Illinois, sales totaled $20,254, one-half to its warehouse and one-half to its local retail stores.

On the record before us, it does not appear that the Employer's operations meet any one of the minimum requirements set out in the Board's established standards for assertion of jurisdiction.

Direct out-of-State shipments of about $22,000 fall short of the $50,000 standard.[1] Because the Employer's products are all finished goods redistributed by its customers either by wholesale or retail sale, they are directly utilized in the customer's services; therefore, such sales properly falling in the indirect outflow category must equal at least $100,000 annually to establish a basis for assertion of jurisdiction.[2] It is clear that the sales to local nonretail enterprises who annually themselves ship over $50,000 outside the State constitute indirect outflow. This is so because the Board would assert jurisdiction over them on the basis of their own direct outflow. As to the within-the-State shipments made to Spiegel's, Inc., and to Sears Roebuck, both retail enterprises, such sales may or may not constitute indirect outflow depending upon whether the particular stores or units of such enterprises, which directly receive the Employer's products, themselves individually make annual shipments of $100,000 out of the State. This is so because the Board would not assert jurisdiction over these stores or consumer outlets on the basis of their direct outflow if their out-of-State shipments were below $100,000.[3] The fact that the Board might also take jurisdiction over such individual stores as integral parts of sufficiently large multistate chains or on

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[1] *Jonesboro Grain Drying Cooperative*, 110 NLRB 481.
[2] *Ibid.*
[3] *Hogue and Knott Supermarkets*, 110 NLRB 543.

the basis of direct or indirect inflow is immaterial here. The indirect outflow concept in our jurisdictional standards is grounded on the assumption of some form of continued outflow directly into the stream of interstate commerce.[4] On this point, the record shows only a stipulation of the parties that sales totaling $78,920 were made to within-the-State retail enterprises each of whom in turn makes out-of-State sales of over $100,000 annually.[5] It was not shown that any of these sales were to individual stores or units of such enterprises which themselves separately have sufficient direct outflow. We therefore cannot properly consider these sales as indirect outflow of the Employer.

In sum, so far as it appears, the Employer's direct outflow equals $22,665 and indirect outflow equals $30,459. Neither separately nor together do these figures satisfy the minimum established standards. No other basis for assertion of jurisdiction having been shown, we shall dismiss the petition.

(The Board dismissed the petition)

Member Murdock took no part in the consideration of the above Decision and Order.

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[4] *New Jersey Poultry & Egg Cooperative Association, Inc.*, 114 NLRB 536.

[5] Apparently, the parties reached this figure by adding the $58,667 sales to Spiegel's Inc., and the $20,254 sales to the stores and warehouse of Sears Roebuck, all in the State of Illinois.

APPENDIX B

(Note: We reprint below, for the Court's convenience, the summary of the Board's 1954 jurisdictional standards contained in the Board's Nineteenth Annual Report, for the fiscal year ending June 30, 1954, which was transmitted on January 4, 1955. The standards were actually announced in press releases on July 1 and July 15, 1954, and made immediately applicable but were not "explicated" in individual case opinions until *Breeding Transfer Co.*, 110 NLRB 493, (see Murdock, dissenting, at p. 501) on October 26, 1954.

The summary reprinted below does not completely accord with standards as announced in the press releases (the second of which is reprinted as Appendix B to the brief of respondent in the *Fairlawn* case, No. 41) because it includes revisions and modifications contained in cases decided later, such as *Bickford's, Inc.*, 110 NLRB 1904. As far as we can determine, the latest case included in the summary is *F. M. Reeves and Sons, Inc.*, 111 NLRB 186 (January 11, 1955). No later resume of the Board's standards is available as far as we know. Since the standards were not adopted as rules and regulations subject to the Administrative Procedure Act, 5 U.S.C. §§ 1002-1003, they have not been published in the Federal Register.)

The majority stated the new standards involved in the cases decided as follows:

We have determined that in the future cases the Board will assert jurisdiction—

1. [General Standards for Other-Than-Retail Establishments:] over enterprises which annually meet one or more of the following standards:

(1) *Direct inflow standard:*

An enterprise which receives goods or materials from out of State, valued at $500,000 or more.

(2) *Direct outflow standard:*

An enterprise which produces or handles goods and ships such goods out of State, or performs services outside the State in which the enterprise is located, valued at $50,000 or more,

The enterprise itself must actually ship the goods to the out-of-State destination.[22]

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[22] *Mast Lumber Co.*, 111 NLRB No. 2; compare *Homer Chevrolet Co.*, 110 NLRB No. 133.

(3) *Indirect inflow standard:*

An enterprise which receives goods or materials from other enterprises in the same State which those other enterprises received from out of State, valued at $1,000,000 or more.

However, the goods must be received by the ultimate purchaser in the form in which they entered the State.[2b]

(4) *Indirect outflow standard:*

An enterprise which furnishes goods or services to other enterprises coming within subparagraph (2), above, or to public utilities or transit systems, or instrumentalities or channels of commerce and their essential links, which meet the jurisdictional standards established for such enterprises; *and*

(a) Such goods or services are directly utilized in the products, services, or processes of such enterprises and are valued at $100,000 or more; [2c] *or*

(b) Such goods or services, regardless of their use, are valued $200,000 or more.

(5) *Multistate standard:*

An establishment other than retail which is operated as an integral part of a multistate enterprise; and

(a) The particular establishment involved meets any of the foregoing standards; *or*

(b) The direct outflow of the entire enterprise amounts to $250,000 or more; *or*

(c) The indirect outflow of the entire enterprise amounts to $1,000,000 or more.

We have further determined that unless an employer's volume of operations meets one of the Board's new independent jurisdictional standards, we will not accumulate those standards in order to assert jurisdiction.[3]

[2b] *Kenneth Chevrolet Co.*, 110 NLRB No. 241.

[2c] See *Pyne Moulding Corp.*, 110 NLRB No. 240, and *Eagle Iron and Brass Co.*, 110 NLRB No. 123; see also *Imperial Rice Mills, Inc.*, 110 NLRB No. 87; compare *G. C. McBride Co.*, 110 NLRB No. 198, declining jurisdiction over a quarry furnishing rock to an interstate railroad because the rock was not "directly utilized" in the operation of the railroad; and *F. M. Reeves and Sons, Inc.*, 111 NLRB No. 25, declining jurisdiction over a concern furnishing materials to a road construction firm since materials were not "directly utilized" in the operational or functional use of the roads.

[3] *Jonesboro Grain Drying Cooperative*, 110 NLRB No. 67. See *Rogers Bros. Wholesalers*, 110 NLRB No. 75.

However, direct and indirect inflow may be added in applying the indirect inflow standard.[3a]

2. [Intrastate Links of Interstate Commerce:] over transportation operations or other local activities which constitute a link in the chain of interstate commerce only where the annual income received by the particular company involved from services which constitute a part of interstate commerce totals no less than $100,000.[4]

It was further announced that jurisdiction will be asserted over (1) intrastate transit companies receiving at least $100,000 annually as a link in interstate transportation of passengers; and (2) over transit companies operating partly or wholly interstate and deriving at least $100,000 annually from (a) interstate operations or (b) from combined intrastate link transportation of passengers and interstate operations.[4a]

(3) [Concerns Doing National Defense Business:] enterprises of this type only if they are engaged in providing goods or services directly related to national defense pursuant to Government contracts, including subcontracts, in the amount of $100,000 or more a year.[5]

(4) [Retailing Concerns:] a company operating a single retail store or service establishment only where the store—

(1) has made annual purchases directly from out of state of at least $1,000,000 in value (direct inflow), *or*

(2) has made annual purchases indirectly from out of State of at least $2,000,000 in value (indirect inflow),[5a] *or*

(3) has made annual sales directly out of State of at least $100,000 in value (direct outflow).

As to *intrastate chains* of retail stores and service establishments we shall continue the practice of totaling direct inflow,

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[3a] *The Brass Rail, Inc.*, 110 NLRB No. 255.

[4] *Breeding Transfer Co., supra.*

[4a] *Rollo Transit Corporation*, 110 NLRB No. 228; see also *Republic Transport Co.*, 110 NLRB No. 247; compare *Edelen Transfer and Storage Co.*, 110 NLRB No. 230; and *Highway Services, Inc.*, 110 NLRB No. 66.

[5] *Maytag Aircraft Corp.*, 110 NLRB No. 70. See also *Ready Mixed Concrete Co.*, 110 NLRB No. 202 (jurisdiction asserted over seller of ready-mixed concrete for construction work at Air Force base); *Massachusetts Institute of Technology (Lincoln Laboratory)*, 110 NLRB No. 232 (jurisdiction asserted over laboratory engaged in research for defense); *Union Cab Co.*, 110 NLRB No. 259 (jurisdiction declined over taxicab company servicing Air Force reservation).

[5a] See, for example, *The Jefferson Co.*, 110 NLRB No. 113.

indirect inflow, or direct outflow of all stores in the chain to determine whether any one of these standards is met. If the totals satisfy any one of these standards, we will assert jurisdiction over the entire chain or over any store or group of stores in it as in the past.[6]

5. [Multistate Retail Chains:] in future cases involving a *multistate* chain of retail stores or service establishments we will assert jurisdiction over the entire chain or any integral part of it if the annual gross sales of all stores or establishments in the chain amount to at least $10,000,000. Otherwise we will assert jurisdiction only over those individual stores or establishments comprising integral parts of the chain which independently satisfy the inflow or outflow standards set forth above.[7]

6. [Franchise Dealers:] the Board will no longer use the "franchise yardstick" for purposes of asserting jurisdiction over automobile dealers or over distributors, wholesale or retail, in any other industry. . . . [W]here . . . a local retail establishment has a franchise agreement with a multistate enterprise the Board will apply the same jurisdictional standards as are applied to other local retail establishments.[8]

7. [Office Buildings:] over an office building operation only when the employer which owns or leases and which operates the office building is itself otherwise engaged in interstate commerce and also utilizes the building primarily to house its own offices.[9]

8. [Utilities and Transit Systems:] over local public utility and transit systems affecting commerce whose gross value of business is $3,000,000 or more per annum.[10]

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[6] *Hogue and Knott Supermarkets*, 110 NLRB No. 68.

[7] *Hogue and Knott Supermarkets, supra.* See also *Liggett Drug Co.*, 110 NLRB No. 157 (jurisdiction asserted); compare *Claffey's Beauty Shoppes*, 110 NLRB No. 97, and *Felsway Shoe Corp.*, 110 NLRB No. 238 (jurisdiction declined).

[8] *Wilson-Oldsmobile*, 110 NLRB No. 74. See also *Homer Chevrolet Co.*, 110 NLRB No. 133; *Grand River Chevrolet Co.*, 110 NLRB No. 98; *Coca-Cola Bottling Co. of San Angelo*, 110 NLRB No. 106.

[9] *McKinney Avenue Realty Co.*, 110 NLRB No. 69; *American Republics Corp.*, 110 NLRB No. 141.

[10] *Greenwich Gas Co.*, 110 NLRB No. 91. See also *Brooklyn Borough Gas Co.*, 110 NLRB No. 11; compare *Southwest Mississippi Electric Power Assn.*, 110 NLRB No. 245, and *Cascade Natural Gas Corp.*, 110 NLRB No. 154 (jurisdiction declined).

Rural electric cooperatives are considered analogous to local public utilities. *Clay Electric Cooperative, Inc.*, 111 NLRB No. 24.

9. [Newspapers:] over newspaper companies which hold membership in or subscribe to interstate news services, or publish syndicated features, or advertise nationally sold products, if the gross value of business of the particular enterprise involved amounts to $500,000 or more per annum.[11]

10. [Taxicabs:] we shall refuse to assert jurisdiction over taxicab companies. . . .[12]

11. [Associations of Employers:] we will adhere to our past practice of considering all association members who participate in multiemployer bargaining as a single employer for jurisdictional purposes. Accordingly, under the new standards, in determining whether to assert jurisdiction, the Board will continue to consider the totality of the operations of the Association members.[13]

The Board announced that it would press compliance with its orders issued under its old standards involving companies which would not come within Board jurisdiction under the new standards.[14]

Subsequent announcements added new standards and indicated areas to which the application of previously announced standards will be extended. Thus, jurisdiction will be asserted

12. [Communications Concerns:] over radio and television stations, and telephone and telegraph systems if the annual gross income of the enterprise amounts to at least $200,000.[14a]

13. [Restaurants:] over restaurants on the basis of the standards established for retail stores.[14b]

14. [Business in the Territories:] as to business enterprises in the Territories, it was announced that special standards established for particular types of businesses will be applied in the Territories.[14c]

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[11] *The Daily Press, Inc.*, 110 NLRB No. 95.

[12] *Checker Cab Co.*, 110 NLRB No. 109, Members Murdock and Petersen dissenting separately.

[13] *Insulation Contractors of Southern California, Inc.*, 110 NLRB No. 105, Member Murdock concurring separately.

[14] *Coca-Cola Bottling Company of Stockton*, 110 NLRB No. 134, Member Murdock concurring separately; Member Rodgers dissenting.

[14a] *Hanford Broadcasting Co. (KINGS)*, 110 NLRB No. 208; *Arkansas Airways Co.*, 110 NLRB No. 229.

[14b] *Bickford's Inc.*, 110 NLRB No. 252. See also *Greyhound Post Houses, Inc.*, 110 NLRB No. 253; *The Brass Rail, Inc.*, 110 NLRB No. 255; and *International Idlewild Catering Corp.*, 110 NLRB No. 257.

[14c] *Sixto Ortega*, 110 NLRB No. 251 (retail bakery); *South P. R. Broadcasting Corp (WISO)*, 111 NLRB No. 45 (radio station); *Union Cab Co.*, 110 NLRB No. 259 (Alaska taxicab company); compare *The Virgin Isles Hotel, Inc.*, 110 NLRB No. 65.